

Terms of Reference

Blue Ribbon Commission on the Use of Competitive Procedures for DOE Laboratories

Purpose

The Department of Energy's competition policy for its management and operating (M&O) contracts has not been re-examined in recent years. This Blue Ribbon Commission is asked to review the Department's laboratory competition policy to determine what criteria the Department should consider when it makes a decision either to extend or to compete its laboratory M&O contracts.

Background

Prior to 1997, the Department's competition policy for its M&O contracts, which includes its research and development laboratories, presumed that a contract would be extended unless the Department would realize a meaningful improvement from competing it. Consistent with the Federal Acquisition Regulation (FAR) and its guidance to review M&O contracts periodically, at least once every five years, the Department evaluated the incumbent's overall performance, the potential impact of a change in contractors, and the likelihood that other qualified offerors would compete for the contract. As a result of that policy, the Department and its predecessor agencies rarely conducted a competition for the management and operation of their sites, facilities and laboratories. The previous practice received much criticism over the years, in part due to the fact that the evaluation of the M&O contractors' performance relied primarily on subjective measures and assessments.

In 1995, the Department announced its intention to change its competition policy and practice for management and operating contracts. It formally changed its internal procurement regulations in 1997 to effect this change and to require that competition be the norm consistent with the Competition in Contracting Act of 1984. As a result of this change, the Department now routinely uses competitive procedures to acquire the services of a contractor to manage and operate its major facilities and sites, unless a specific justification for noncompetition exists in accordance with statutorily provided exceptions and the use of noncompetitive procedures is approved as necessary by the Secretary of Energy. The Competition in Contracting Act of 1984 contains specific statutory authority that would allow the Department of Energy to noncompetitively extend its laboratory contracts, but the application of this authority is permissive, not mandatory. Accordingly, at the expiration of the contract term, the Department routinely considers for competition the contracts for the management and operation of laboratories.

The Department now has competed virtually every M&O contract in its inventory, except for its laboratory management contracts. It currently has 18 M&O contracts for its

laboratory facilities. Of those, 8 have been competed.¹ Competition has been applied when the operator of the laboratory was a for-profit entity, whenever mission changes warranted a review of the capabilities of other offerors, or when the incumbent's performance was unsatisfactory. The contracts that have been noncompetitively extended, for the most part, have been with non-profit and educational institutions, are characterized by superior performance, and/or reflect one or more impediments to effective competition (e.g., contractor ownership of land on which the Department's facilities are sited.)

The issue of whether competition should be routinely used for research and development laboratories is subject to wide and varied opinions. The Department's current policy favoring competition has been both applauded and criticized. On one hand, both GAO and certain members of Congress have questioned the continued use of noncompetitive procedures for laboratories. On the other hand, the Department's practice of actively considering competition and its willingness to use competitive procedures has also been criticized as destabilizing to the mission of the laboratories and antithetical to the concept of a Federally Funded Research and Development Center (FFRDC).

Federal statutes and regulations provide some guidance for determining whether to compete a laboratory contract. Most notably, the Competition in Contracting Act (CICA) of 1984 and the Federal Acquisition Regulation establish a government-wide framework under which "full and open competition" for the acquisition of property and services by executive agencies is the norm. However, CICA contains seven specific statutory exceptions to competition that authorize the use of "other than" full and open competition in certain situations, including when an agency has the need to "establish and maintain an essential engineering, research, or developmental capability to be provided by an educational or other nonprofit institution or a federally funded research and development center." Notwithstanding these authorized CICA exceptions, annual provisions in the Energy and Water Development Appropriation Acts since Fiscal Year 1998 have required DOE (but not other Federal agencies) to compete the award and extension of M&O contracts unless the Secretary of Energy determines to waive that requirement and so notifies the Energy and Water subcommittees sixty days prior to contract award. Given this background and the continuing controversy over the use (or non-use) of competition procedures, the Department desires an independent assessment of its current competition policy with respect to its laboratories.

Description of the Commission's Duties

This Blue Ribbon Commission is asked to assess the Department's competitive procedures to determine the circumstances and criteria under which competition can best assist the Department in maintaining high quality, state-of-the-art research and efficient and effective operation of its government-owned research facilities. The objective of this effort is to advise the Department on an appropriate decision model based on relevant

¹ Two of the eight laboratories competed are currently not designated as DOE Federally Funded Research and Development Centers. They are the Bettis Atomic Power Laboratory and the Knolls Atomic Power Laboratory, both of which are under the auspices of the National Nuclear Security Administration.

criteria and organizational status of the M&O contractor. The assessment should include a comprehensive review of applicable laws, regulations and policies pertaining to the Department of Energy's use of competition for its laboratories and the policies and practices of other Federal agencies with respect to competing laboratories.

The assessment should answer the following questions:

- •When is competition appropriate? Should all contracts be competed, or if not, what criteria should be assessed in deciding to compete or to extend a laboratory contract?
- Should a formal regimen for making competition decisions be established? Or is greater flexibility desirable?
- Should different standards and decision criteria be developed according to the status of the M&O organization (non-profit, educational institution, academic consortium, or commercial entity) or the nature of the work or mission?

Specific areas to be addressed in the study include

- Assess and identify any benefits or disadvantages derived from competing laboratories. Provide the rationale for any recommendations or conclusions included in the report.
- If laboratories should be treated differently for making compete/non-compete decisions, identify and assess the criteria and other considerations that the Department might use in determining whether or not to compete a laboratory contract.
- Identify and assess potential criteria that the Department may use in deciding the types of entities that should manage and operate its laboratories.

Performance Expectation:

The study should be objective and balanced and provide a basis for the Department to establish a rational policy and, as appropriate, a rigorous decision-making process for laboratory competitions or extensions. The study shall provide sufficient information and analysis to permit the Department of Energy to exercise its judgment with respect to the report's recommendations.

Estimated Number and Frequency of Meetings:

This Blue Ribbon Commission shall meet as required. In order to enhance members' knowledge and understanding of DOE contracting and competitive issues, the Department may organize site visits as needed. Additionally, the Commission may hold meetings outside of Washington, D.C. as required to fulfill its mandate.

Membership:

The Blue Ribbon Commission shall have at least six members, including at least one individual who is also a member of the SEAB. The remaining members shall be appropriate experts in fields of importance to DOE, business executives, and others with knowledge pertinent to the scope and objectives of this study, representing a balance of viewpoints. The Chairman of the SEAB, in consultation with the Secretary of Energy, shall appoint the Chair, as well as all other members.

Duration and Termination Date:

This Task Force shall serve for approximately six months, subject to the extension or dissolution by the Chairman of the SEAB.

May 1, 2003